SUPREME COURT, U.S.

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IN THE

# Supreme Court Of The United States

CHARLES K. SMITH ..... *Petitioner*

vs. No. 75-1123

STATE OF ARKANSAS ..... *Respondent*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS*

## BRIEF FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

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## OPINION BELOW

The opinion of the Supreme Court of Arkansas (App. to Petition) is reported at 258 Ark. 601, 528 S.W. 2d 389 (1975).

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

Whether the Equal Protection Guarantee of the United States Constitution was violated by the imposition of disparate sentences upon a co-defendant who pled guilty and one who stood trial.

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are adequately set forth in the Petition.

## STATEMENT OF THE CASE

Petitioner Smith and James E. McDaniel were arrested in Cross County, Arkansas on September 2, 1974, for possession of a controlled substance (marijuana) with intent to deliver. (App. to Petition, pg. 19) Petitioner's trial on this charge was held on February 4, 1975, and he was convicted by a jury that fixed his punishment at three years in the state penitentiary. (App. to Petition, pg. 20) Two days later, on February 6, 1975, co-defendant McDaniel pled guilty to the same charge, was sentenced by the trial court to three years and was placed on probation for that period, pending his good behavior. (App. to Petition, pg. 21-22)

The issue of the disparate sentencing of the co-defendants was raised in Petitioner's appeal to the Arkansas Supreme Court and was decided adversely to him. (App. to Petition, pg. 12-13)

## ARGUMENT

### I.

THE IMPOSITION OF DISPARATE SENTENCES UPON PETITIONER WHO STOOD TRIAL AND HIS CO-DEFENDANT WHO PLED GUILTY DID NOT DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS.

The gravamen of Petitioner's assertion is that, by exercising his constitutional right to trial by jury, he received a harsher sentence than that imposed by the trial court two days later upon his co-defendant who had pled guilty to the same charges. This discrepancy, states Petitioner, violated his constitutional guarantees of equal protection of the laws. However, Respondent asserts that, absent other persuasive factors, Petitioner's claim must fail.

A disparity between a sentence imposed upon a defendant who pleads guilty and upon another who is convicted after trial is not sufficient to establish that the latter has been punished for exercising his constitutional right to trial by jury. *United States v. Wilson*, 506 F. 2d 1252 (7th Cir. 1974). As the trial court has great discretion in its imposition of sentence, there must be present some exceptional circumstances to justify the exercise of a reviewing court's supervisory power in any action that challenges the trial court's use of the sentencing process. *Yates v. United States*, 356 U.S. 363, 366 (1958); *United States v. Kaczmark*, 490 F. 2d 1031 (7th Cir. 1974).

Petitioner fails to even allege the presence of any such exceptional circumstances; therefore, his reliance upon *United States v. Wiley*, 278 F. 2d 500 (7th Cir. 1960) and *Hess v. United States*, 496 F. 2d 936 (8th Cir. 1974), is misplaced. In *Wiley*, the trial court had announced a

standing policy that it would not consider an application for probation by a defendant who pled not guilty and stood trial. 278 F. 2d at 501. In *Hess*, the tenor of the trial court's remarks at sentencing, while not conclusively supporting the defendant's allegation, was sufficiently unclear to compel an explanation of the motivating factors for the sentence from the district judge. 496 F. 2d at 938.

There is no evidence in this record that the trial court considered any improper factor when it allowed Petitioner's co-defendant a three year probationary sentence. Furthermore Petitioner received the minimum term of incarceration authorized for violation of *Ark. Stat. Ann.* §82-2617 (ii) (Supp. 1973).

The mere allegation of disparity in sentencing is insufficient to allow Petitioner the relief requested and Petitioner's claim of constitutional deprivation cannot prevail. *Griggs v. Swenson*, 352 F. Supp. 743, 745 (W.D. Mo. 1973).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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